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Executive Registry

18 March 1980

80-6061/7

MEMORANDUM FOR THE RECORD

SUBJECT: 18 March Tasking re Current Crises (U)

1. During the 18 March debrief of the morning's SCC the DDCI requested the following actions be undertaken in preparation for the 20 March SCC meeting:

- a. Noting that there would be discussion on what tactics we (USG) might pursue in the near future to gain resolution of the hostage question (and noting that some hold the view that Khomeini is susceptible to pressure), review again those options we have to consider. (Pros and cons of each tactic should be noted, and differing views to be highlighted.) (Action: Iran Task Force in coordination with DDO, OER--anyone with any ideas should get them to [redacted])
- b. Review and provide comment on new Attorney General paper on "Vesting of Iranian Interests" (attached). (Action: OER)
- c. Update of grain embargo issues following Wednesday's Implementing Group meeting. (Action: OER)
- d. Review and provide comment on State's "Neutrality and Non-Aligned" paper re Afghanistan (attached). (Action: Afghan Task Force) [redacted]

2. All of the above items to OCO for inclusion in DCI/DDCI Morning Material for Thursday, 20 March SCC meeting. [redacted]

3. Please advise PB/NSC when required actions completed. [redacted]

NSC review(s) completed.

DOJ Review Completed.

PB/NSC Coordinator

Attachments

cc: DCI D/PA
DDCI Ch/NIC
DD/NFA DD/CT
DDO C/OCO
GC ES
LC

OGC Has Reviewed

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United States Department of Justice
Washington, D.C. 20530

12 MAR 1980

ASSISTANT ATTORNEY GENERAL
OFFICE OF LEGAL COUNSEL

MEMORANDUM FOR THE ATTORNEY GENERAL

Re: Vesting of Iranian Assets

We have been asked to address a number of issues relating to possible vesting of Iranian assets. This preliminary response has been prepared in cooperation with the Civil Division.

I. Existing Authority

At present no Iranian assets have been vested or seized. Vesting is a process by which the United States would take title to assets of a foreign country or its nationals. Under Executive Order No. 12170 of November 14, 1979, the President blocked property of the Iranian government, its instrumentalities, and the Central Bank of Iran. The blocking order prevents property from being transferred or withdrawn but does not permit its use by the United States or change title to it. This action was taken pursuant to the International Emergency Economic Powers Act, 50 U.S.C.A. § 1701. This Act does not, however, provide authority to vest property. 1/

The Trading with the Enemy Act provides for both blocking and vesting of foreign property. 50 U.S.C. App. § 5(b). Until 1977, when the International Economic Powers Act was enacted, the Trading with the Enemy Act applied both during wartime and during any other period of national emergency declared by the President. It was amended, however, so that it now applies only during wartime. 91 Stat. 1625 (1977). Therefore the national emergency relating to Iran declared by the President on November 14, 1979, does not trigger the Trading with the Enemy Act. If the Trading with the Enemy Act were to be used it would be necessary to declare war. In the absence of such a declaration it would be necessary to seek new legislation.

1/ No private property of Iranian nationals was blocked although the International Economic Powers Act is broad enough to permit this. It would be necessary for the President to issue an additional order to accomplish blocking of private property since the November 14 order only permits the Secretary of the Treasury to block Iranian government property. Presumably, such action would be necessary pending vesting legislation; otherwise, the property could be withdrawn in the interim. The vesting of private assets presents issues different from those concerning vesting of government assets, as we discuss below.

II. Proposed Legislation

If the Administration seeks legislation permitting vesting of Iranian assets a number of policy and legal questions would have to be faced. These include whether to provide in the legislation for disposition of the assets once vested and what that disposition should be.

We do not think that any domestic constitutional issue arises in the taking of Iranian government property. The Fifth Amendment by its terms applies only to the taking of "private property" without just compensation. Thus, on its face the Just Compensation Clause does not apply. The role of the Constitution in domestic law, as well as the text, supports this conclusion. Constitutional protections limit the power of the United States to act upon persons who are subject to its power by virtue of their presence in this country or their activities here. The United States asserts its power with respect to foreign nations because as a sovereign among equals it enjoys powers and privileges under international law and not because of its domestic authority. 2/ Cf. United States v. Curtiss-Wright Export Co., 299 U.S. 304, 315-18 (1936).

The precedents for this type of legislation have focused on providing for settlement of private claims against a foreign government, while government-to-government claims have been settled directly. See the International Claims Settlement Act of 1949, as amended, 22 U.S.C. § 1621, et seq. There is no reason, however, why the legislation has to be so limited. As discussed below, vesting for the benefit of either private claimants or the United States Government would be consistent with international law.

III. International Law

1. Damages

The United States has claimed that Iran has flagrantly violated its treaty obligations to the United States including those under the Vienna Conventions on Diplomatic and Consular

2/ Vesting property of private Iranian citizens presents constitutional issues which should be examined in detail if there is any intent to act regarding private property. Russian Volunteer Fleet v. United States, 282 U.S. 481 (1931). But see Sardino v. Federal Reserve Bank 361 F.2d 106 (2d Cir. 1966), cert. denied, 385 U.S. 898 (1966).

Relations. 23 UST 3227 and 21 UST 77. Breach of an international agreement involves an obligation to make reparation in an adequate form, even when the treaty does not specify damages as a remedy. E.g., Corfu Channel Case, [1949] I.C.J. Reports at pp. 23-24.

Self-help is recognized in international law as a method of securing payment for damages. The unquestioned right of a state to protect its nationals in their persons and property while in a foreign country must permit initial seizure and ultimate expropriation of assets if other methods of securing compensation should fail. E.g., Sardino v. Federal Reserve Bank of New York, 361 F.2d 106 (2d Cir. 1966), cert. denied, 385 U.S. 898 (1966).

The United States is now proceeding against Iran in the International Court of Justice. The Court ruled as a preliminary matter on December 15, 1979, that Iran has violated pertinent treaties. It has not yet ruled on the question of damages. In January the United States submitted a Memorial (brief) to the Court seeking a judgment that the United States is "entitled to the payment to it, in its own right and in the exercise of its right of diplomatic protection of its nationals held hostage, of reparation . . . in a sum to be determined by the Court at a subsequent stage of the proceedings." It is likely that the issue of liability will be argued to the Court in the near future and there is every reason to anticipate a favorable judgment on the question. Such a judgment would, of course, lend support to any self-help remedies the United States may seek to apply. If in a subsequent hearing the Court were to find damages in an amount less than that seized by the United States, we might face the issue of whether part of the assets should be returned.

2. Reprisal

Apart from the issue of damages, vesting may be viewed as a reprisal for the continuing violations of international law by Iran and thus as an element of our diplomatic efforts to end those violations. A. David, The Strategy of Termination: Lawful Breaches and Retaliations 234 (Yale Univ. Press, 1975). Non-forcible reprisals may be used in the case of breach of treaty obligations. Commentary on Vienna Convention on Law of Treaties, [1966] 2 Y.B. Int'l L. Comm'n 253-54. Since other means of settling the dispute have failed, and since we can argue that seizure is reasonably proportional to the injury suffered, this action can be justified as meeting the standards of customary international law. E.g., 12 M. Whiteman, Digest of Int'l Law 321-28. We take no position on whether vesting will be an effective method of resolving the diplomatic impasse.

IV. Effect of Vesting on Pending Litigation

1. Domestic Litigation

What effect would a vesting of Iranian Government-owned assets have on domestic suits -- and especially on pre-judgment attachments which have been attempted by American creditors, primarily by American banks who have in their custody Iranian Government deposits?

The Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1602, deals comprehensively with the suability of foreign states and their agencies and instrumentalities, and defines the circumstances under which property of such entities can be attached prior to judgment and levied upon in satisfaction of judgments. Whether a suit is properly brought and whether an attachment is valid is, therefore, a question of Federal law; State law is relevant only in those instances where attachment is authorized under the Immunities Act; State law defines the rights obtained by an attachment creditor. 3/

Vesting of Iranian Government-owned assets would have little effect on pending suits. It would be for the courts to determine on a case-by-case basis whether the Immunities Act confers jurisdiction. Vesting, however, would impact upon the pending pre-judgment attachments.

A majority of the attachments which have been sought are in all likelihood invalid because they either seek to reach property of the Iranian Government not used for a "commercial purpose," or because the property sought to be reached belongs to an Iranian entity which is distinct from the debtor entity. An American claimant who attempted an unauthorized attachment would not be deprived of any cognizable property interests if the asset is vested and title passes to the United States.

3/ The Iranian Assets Control Regulations expressly authorize pre-judgment attachments. 31 C.F.R. § 535.418 (as added on December 19, 1979). But the regulations authorize such attachment only where federal or state law grants a right to a creditor to attach his debtor's property; the regulations themselves are not a source of substantive creditor's rights.

In instances where attachments are proper under the Immunities Act, their legal effect would have to be determined under State law. A valid attachment would not be cancelled or annulled upon vesting, even if the property were "frozen" at the time the attachment was obtained. Zittman v. McGrath, 341 U.S. 446 (1951) (holding that a "right, title and interest" vesting leaves undisturbed any property interests acquired by a pre-vesting attachment creditor). When vesting property, the Federal Government merely steps into the shoes of the pre-vesting owner (here, the Iranian Government). This does not mean that property in which an attachment creditor obtained an interest under State law is not subject to vesting. The Second Zittman case teaches (Zittman v. McGrath, 341 U.S. 471) that the Federal Government may enforce a transfer of possession of the funds "for purposes of administration." During such administration -- which is akin to a receivership -- the preexisting rights of attachment creditors must be preserved. State law would determine whether an attachment creditor would be entitled to a preference if the assets of the pre-vesting owner turn out to be insufficient to satisfy the obligation owed to the creditor.

2. Effect on Foreign Litigation

Legislation authorizing the vesting of Iranian property would, under principles of international law, not be enforceable against property located abroad. 4/ Iranian dollar deposits in U.S. Branch banks abroad could be reached only if the foreign courts were to hold that such dollar deposits in U.S. Branch banks are in reality located at the home office of the banks in the United States. Of course, that issue is presently being litigated in English and French courts with respect to the Presidential freeze order.

4/ See Ingenohl v. Olsen, 273 U.S. 541, 544 (1927): "If the Alien Property Custodian purported to convey rights in English territory valid as against those whom English law protects he exceeded the powers that were or could be given to him by the United States." Attempts by states to extend their seizure powers extraterritorially have failed. See, e.g., Republic of Iraq v. First National City Bank, 353 F.2d 47 (2d Cir. 1965), cert. denied, 382 U.S. 1027 (1966).

While authorizing vesting of domestic assets, Congress could confirm the preexisting Presidential freezing order on Iranian Government-owned assets in the custody of American nationals abroad, in which case the pending litigation in England and France would continue. Congress could, in the alternative, lift the freeze on Iranian assets held by Americans abroad, thus mooting the litigation (as far as the extraterritorial reach of the Presidential freezing order is concerned).

John M. Harmon
Assistant Attorney General
Office of Legal Counsel

NATIONAL SECURITY COUNCIL

WASHINGTON, D.C. 20506

**UNCLASSIFIED WITH
SECRET ATTACHMENT**

Marhc 17, 1980

MEMORANDUM FOR:

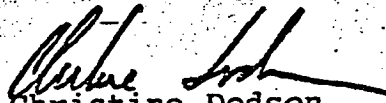
The Vice President
The Secretary of State
The Secretary of the Treasury
The Secretary of Defense
The Attorney General
The Counsel to the President
The Chairman, Joint Chiefs of Staff

SUBJECT:

Paper for Tomorrow's SCC Meeting

Reference Item 1 on tomorrow's SCC agenda:

To provide some advance notice, the Department of State will be briefing on Afghanistan along the lines of the attached.


Christine Dodson
Staff Secretary

Attachment

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ELEMENTS

Prompt
 1. Withdrawal of all Soviet military forces from Afghanistan.

2. An Afghan government acceptable to the Afghan people.

3. No interference in the internal affairs of Afghanistan by its neighbors or any other state.

4. Non-alignment in Afghanistan's foreign policy and permanent neutrality for Afghanistan, including the obligation to refrain from entering into any military alliance, and to refrain from allowing any state to have military forces or facilities in its territory except by agreement of the guarantors.

5. Guarantees by Afghanistan's neighbors and other interested states of permanent neutrality for Afghanistan and of non-interference in its internal affairs.

sub element of 3. Restate it.
 6. Agreement by the Afghan government and all guarantors on the definition of Afghanistan's borders.

sub
 7. Arrangements to apply only to Afghanistan and not to affect the sovereign rights of other countries.

Take out, use as response.

use as response points

Demand line

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(Similar to Brits.)

ESSENTIAL ELEMENTS OF "NEUTRALITY AND NON-ALIGNMENT"
FOR AFGHANISTAN

-- Important we have common perception of what might emerge from concept of Neutral and Non-Aligned Afghanistan.

-- Complex issues involved which will need considerable work.

-- Need now for consensus on "framework elements" which could serve us all in talking to Soviets and others so we present common, cohesive views as we pursue conversations independently.

1. Withdrawal of all Soviet Military Forces.

-- This is a clear, fundamental objective, which was set forth in the UNGA resolution and which we all share.

2. Government Acceptable to the Afghan People.

-- Formation of a government acceptable both to the Afghan people and to the USSR will be difficult.

-- The test of acceptability could come through a traditional Afghan tribal consensus, through elections -- although these would probably come after any government had been in place for some time, or through the practical test of ending civil war.

3. No Interference in Internal Affairs.

-- This element is one of several designed to exclude future Soviet intervention and to reassure the Soviets about any Western intervention.

-- It presumes parallel obligations by Afghanistan's other neighbors and other countries; it is consistent with the UN Charter non-aligned principles; and it is intrinsic to preservation of independence.

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4. Neutrality, Non-Alignment and no Foreign Military Forces.

-- Neutrality and non-alignment are complicated issues but key aspects are:

- No participation in any military alliance.
- No foreign military forces or facilities.

-- Key objective of this element, as of preceding one, is to assure against return of Soviet forces. At the same time it assures Soviets that Afghanistan will not be used by others against the USSR.

-- Reference to allowing forces in Afghanistan by agreement of guarantors leaves open the possibility of an international observer or peacekeeping force on which both West and Soviets would have to agree, or of limited number of military advisors who would train Afghans in use of military equipment.

5. Guarantees.

-- These provide international weight behind non-interference and neutrality elements and may be necessary for greatest credibility and subsequent deterrent effect on Soviets.

-- For same reason, we may want to link arrangements to UN at some point but we have proposed formulation which provides flexibility for other conceivable arrangements as well.

-- We recognize there are other approaches which could be used which are more equivocal and imply less obligation to act in the event of violations, e.g., we could express respect for these elements rather than guarantee them. In either case, we will need to look at how apparent violations would be dealt with.

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-- We want to get the firmest possible assurances by Soviets against interference by Soviets; they are likely to want these from others as well. Their insistence on "guarantees" represent the only slight opening we have seen in the official Soviet position thus far.

6. Agreement on Border.

-- Dilemma is that Afghans and Soviets have never accepted "Durand Line" as Afghan-Pakistan border. Guarantees on "non-interference" would seem to require agreed understanding on territory to be covered.

-- We recognize this is a sensitive issue on which alternative formulations may ultimately need to be sought.

7. Not Affect Other Countries.

-- To assure that the arrangement applies to Afghanistan and not to its neighbors or to the region, and is not used by Soviets to bargain against interests elsewhere or to give Soviets droit de regard over other countries.

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